IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5737 of 1987

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

THAKORBHAI N PATEL

Versus

STATE OF GUJARAT

Appearance:

MR SR SHAH for Petitioner

MRS. HARSHABEN DEVANI ASST. GOVT. PLEADER for RES.No. 1, 2, 3

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

Date of decision: 23/02/2001

ORAL JUDGEMENT

1. The petitioner is the owner of Cinema Theatre at village Karchalia, Taluka Mahuva, District Surat. Under the Bombay Cinemas (Regulation) Act, 1953, it is categorised as Janata Cinema and being located in a

village with a population of less than 5000 is entitled to pay entertainment duty under the Gujarat Entertainments Tax Act, 1977 in lumpsum on the basis of total seating capacity of the cinema and on the assumed gross total tax collection.

2. The learned counsel for the petitioner brings to the notice of this Court the relevant provisions contained in Section 3(1A) as they stood prior to their deletion by Gujarat Amendment Act No. 10 of 1989. Section 3(1A) which is a charging Section for levy of entertainment tax on theatres in designated area provide for payment of lumpsum tax on the basis of gross tax collection. Expressions `designated' and `gross tax collection' are defined in Explanation (1) and (3). The relevant part of the provision contained in Section 3(1A) with its Explanations (1) and (3) thereunder read as under:-

"3(1A) There shall be levied and paid to the State Government, in respect of an entertainment by cinema a tax at the following rates, namely :-

(I) within the limits of a designated area at the rate of 20 per cent, of gross tax collection per show,

(II) within the limits of a specified area at the rate of 21 per cent of gross tax collection per show.

Explanation. - For the purposes of this section and section 6, -

(1) the expression "designated area" means a local area the population of which, as ascertained at the last preceding census and notified by the State Government in the Official Gazette after such census, is not more than 5,000 and which is not within 5 kilometers from any other local area the population of which, as ascertained at the last preceding census and notified by the State Government in the Official Gazette after such census, is more than 10,000;

(2) xx xx xx

(3) the expression, "gross tax collection" means the amount of tax that would have been leviable at the rates specified in item (III) of clause (a) of sub-section (1) on the total amount of payment for admission to an entertainment by cinema in designated area or specified area as if admissions were to the extent of full sitting capacity of the auditorium of cinema,-

(i) to (iii) xx xx xx"

3. The attention of the Court is also invited to Section 6 which permits a proprietor of a theatre to apply to the Government for compounding of the total tax. Subsection (5) of Section 6 permits that where the entertainment tax has been allowed to be compounded for a cinema in designated area, tax shall be levied at a fixed percentage mentioned in subsection (5) of Section 6.

4. The cinema theatre of the petitioner was subjected to a surprise check and according to the Authorities it was revealed that several duplicate tickets were found in the compound. On that basis a show cause notice under Section 9 r.w. Rule 15(2) of the provisions was issued to the petitioner to show cause why he may not be subjected to reassessment of tax. The total tax demanded was in the sum of Rs. 29,153.35ps. A penalty was also proposed.

5. The petitioner submitted a reply stating that he having adopted the mode of payment of entertainment duty in lumpsum in accordance with Section 6 of the Act, such an action of the respondent Authorities for reassessment of tax was totally unwarranted.

6. By the impugned order dated 26-4-1986/7-6-1986 (Annexure B) the petitioner was held liable to pay a sum of Rs. 64,153.35ps. towards payment of entertainment duty and fine.

7. The petitioner preferred a revision under Section 13 of the Act and the same was also rejected by Entertainment Tax Commissioner by the impugned order dated 19-8-1987 (Annexure C).

8. In this petition under Article 227 of the Constitution of India, learned counsel Shri S.R. Shah appearing for the owner of the theatre has assailed the action of the Authorities mainly on the ground that where a theatre meaning Janata cinema within the `specified area' has been allowed to pay lumpsum tax by way of compounding under Section 6 of the Act, merely on finding certain fake tickets in the cinema campus, the proprietor cannot be subjected to reassessment of duty to the best of judgment. It is submitted that recovery of duplicate tickets from the campus of the theatre may give rise to other inferences regarding breach of the provisions or income tax liability, but it does not furnish any ground whatsoever to reassess the owner for entertainment duty and payment of fine.

9. Learned AGP Mrs. Devani appearing for the State

invites my attention to the stand of the Authority as taken in the reply affidavit, based on Section 30 of the Act. It is submitted that where the owner of a theatre is exempt from payment of tax and is found to have committed breach of any conditions on which the tax has been exempted, he can be made liable to pay tax in accordance with ordinary procedure.

10. The provisions of Section 30 read as under:-

"30.(1) Where any entertainment is exempted under section 29 from the whole or any part of the tax payable under this Act subject to any condition, then, in the event of a breach of any such condition the proprietor shall, notwithstanding such exemption, be liable to pay tax in relation to such entertainment.

(2) Where the prescribed officer has reason to believe that any proprietor has incurred liability to pay tax under sub-section (1), he shall serve on the proprietor, a notice requiring him on a date and a place specified therein, either to attend and produce or cause to be produced all evidence on which such proprietor relies in connection with his liability under this section or to produce such evidence as is specified in the notice.

(3) On the date specified in the notice, or as soon as may be thereafter, the prescribed officer, after considering all the evidence which may be produced, assess to the best of his judgement the tax due from the proprietor."

11. A bare reading of the opening part of the provision makes it clear that it speaks of entertainment tax which is exempted under section 29. Section 29 of the Act contains power of the State Government to exempt whole or in part certain kinds of entertainments from duty e.g. for educational, medical, charitable, philanthropic and other such purposes. This is not a case where the owner of the theatre was enjoying any exemption from tax on the basis of any notification under Section 29. Resort, therefore, to the provisions of Section 30 is totally misplaced. In the instant case, the owner of the theatre as Janata cinema was carrying on the business in designated area and was allowed lumpsum payment of entertainment duty in accordance with the provisions of Section 6. If certain spurious or fake tickets were found in his premises, that may subject him to some other liability under the Act or other laws but he cannot be subjected to assessment of tax to the best

of judgment under Section 9 of the Act. It is not a case as contemplated in Section 9 of `escapement of tax where it is leviable'. Since the petitioner had adopted payment of lumpsum tax on gross tax collection basis, there was no escapement of assessment of tax and no attempt to evade payment of entertainment duty. The impugned action of the tax Authority was, therefore, totally unwarranted.

12. As a result, the petition succeeds and is hereby allowed. The impugned order dated 26-4-1986/7-6-1986 (Annexure B) passed by Deputy Commissioner, Entertainment Tax, Surat and the consequent revisional order dated 19-8-1987 passed by Entertainment Tax Commissioner, Gandhinagar both are quashed.

Rule is made absolute. Interim relief is vacated.

In the facts and circumstances of the case, i leave the parties to bear their own costs.

(D.M. DHARMADHIKARI, C.J.)

[sndevu]